

# THE INTERIM

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## PUBLIC COMMENT SOUGHT FOR HJR 4 WATER MANAGEMENT STUDY

Environmental Quality Council Invites Public Comment...House Joint Resolution No. 4, passed during the 2003 legislative session, requested a study to investigate options for improving the supply and distribution of water in Montana and to evaluate the state's water storage policies. The study has been assigned to the Environmental Quality Council. The resolution is specific about involving a wide variety of private and public entities in the study and gathering as much public input as possible. In order to obtain information efficiently and to reduce the need for the public to travel long distances to committee meetings, the EQC has developed a "feedback" form that is available on its website. If you would like to provide your views to the EQC on the various water policy issues that are being considered under the study, please take the time to fill out the form. The form may be completed by going to <http://leg.mt.gov/hjr4.asp>. The EQC is asking for your views on the following issues:

- water storage and distribution;
- capture and use of flood waters;
- enforcement of water decrees;
- water banking;
- accuracy of water decrees;
- institutional objector and the adjudication process;
- user fees associated with water adjudication;
- water right permit and change process;
- surface water and ground water interconnectivity; and
- federal reserved water rights;

Let other people or organizations that have an interest in water policy know

about this opportunity. You are also invited to attend the EQC meetings to express your views. If you have questions or comments about the feedback form, the HJR 4 study, or other water policy issues, please contact Krista Lee Evans, legislative research analyst, at (406) 444-3957 or [kevans@mt.gov](mailto:kevans@mt.gov). Additional coverage of the EQC is on page 6.

## EDUCATION AND LOCAL GOVERNMENT COMMITTEE

Committee Meets in October...The Education and Local Government Committee met on Thursday, Oct. 30 in Helena. The Local Government Subcommittee and the K-12 Education Subcommittee met in the morning and the full committee met in the afternoon. Coverage of each subcommittee meeting is found farther down in this article.

Committee Hears from Higher Education Officials...Ed Jasmin, chair of the Board of Regents, and Sheila Stearns, Commissioner of Higher Education, discussed key postsecondary education issues for the interim. Jasmin reviewed the policy goals and accountability measures agreed to by the Board of Regents and the Postsecondary Education Policy and Budget Subcommittee last interim. Stearns reviewed the higher education budget adopted by the regents for fiscal year 2004. Jasmin said that the regents are looking forward to working with the governor's budget office to refine the budget process and have set a goal to communicate better about the university system. He also discussed long-range trends and assumptions about revenues and expenditures. The university system is projecting revenue shortfalls through fiscal year 2009. Stearns discussed some possible actions to mitigate the projected deficits, including:

- expanding efforts to attract nonresident students;
- increasing the 6-mill levy or considering local levies to support higher education;
- requesting legislative assistance to defray costs of unfunded retirement liabilities;
- reexamining administrative relationships between the state and the university system and among campuses to lower costs for providing services; and
- examining ways to increase efficiency in producing student credit hours.

During a recent retreat, the Board of Regents identified some priorities for the university system, including:

- communication and outreach activities to explain the importance of the university system to the people of Montana and especially emphasize the role of higher education in economic development;
- a new budgeting process for the university system, with participation from public and government leaders;
- economic development activities within the university system, with special emphasis on the role of two-year education; and
- emphasis on quality, using terms and measures that students and Montana citizens can understand.

Montana Association of Counties Presents Plans for the Interim... Gordon Morris, executive director of MACo, said that MACo has five interim priorities:

- promoting tax reform in Montana;
- taking an active role in economic development;
- addressing subdivision concerns;
- seeking improvement of the mental healthcare system; and
- working with the Law and Justice Committee on the administration and funding of public defender services.

K-12 Education Subcommittee Meets for First Time... The K-12 Education Subcommittee met on Oct. 30. Members of the subcommittee are Reps. Larry Lehman, chair, Norm Ballantyne, Tom Facey, and Verdell Jackson.

Alec Hansen, Montana League of Cities and Towns, and Tom Bilodeau, MEA-MFT, discussed statewide health insurance pools for city and school district employees. Hansen said that the league has contracted with a California firm to conduct a feasibility study of a statewide health insurance pool for city employees. Bilodeau presented information on the need for a similar health care pool for school employees. Although the idea died in the 2003 legislative session, the need remains and is, in fact, even stronger. One of the issues that concerned subcommittee members was mandatory enrollment in the pool. Bilodeau said that mandatory enrollment is needed to make the pool work and that voluntary enrollment may result in adverse selection and unpredictability. There was some discussion about how the pool would be funded. Some of the suggestions included providing a direct entitlement that would

be similar to the district and per-ANB entitlement, providing a monthly employee subsidy as part of the school funding formula, or putting money directly into the statewide pool.

Sen. Don Ryan asked the subcommittee to consider looking at ways to mitigate the effects of PPL Montana's protested taxes on school district budgets and on guaranteed tax base aid. The Great Falls school district as well as districts in Colstrip and Thompson Falls have been severely impacted.

Other issues identified for possible study include the use and effectiveness of federal education dollars, especially related to No Child Left Behind; control by local school boards over their budgets; and the proportion of state money that is used for classroom instruction versus the amount spent on centralized administration.

Local Government Subcommittee Adopts HJR 37 Study Plan... The Local Government Subcommittee (Sens. Jeff Mangan, Rick Laible, Bill Glazer and Rep. Joan Anderson) met on Oct. 30 to identify the scope of its assigned study and to discuss other topics it may address during the interim. The subcommittee decided that it will spend most of its time during the coming months on the study of the Subdivision and Platting Act, requested in House Joint Resolution No. 37, and that additional items, such as local government impact fees, would be taken up as time allowed.

Department of Environmental Quality representatives Jim Madden and Bonnie Lovelace and Lewis and Clark County and City of Helena planners Sharon Haugen and Lucy Gengler explained the basics of the Sanitation in Subdivisions Act (Title 76, chapter 4, MCA) and the Subdivision and Platting Act (Title 76, chapter 3, MCA) and how those provisions in the law are administered. They emphasized that the state administers sanitation review while local entities are charged with review under the Subdivision and Platting Act.

Individuals representing realtors, the building industry, planners, the Smart Growth Coalition, surveyors, counties, and local health departments provided testimony on suggested study topics. Many of the witnesses urged the subcommittee to focus on process, specifically the timelines that are in statute, rather than on standards or on review criteria. A common complaint about subdivision review is that the process takes too long from the time that an application is submitted until an applicant receives approval to proceed with a project. Other problems with the process, according to those who testified, include:

- pre-application meetings required by some local entities take too long to schedule or are difficult to schedule;
- applicants are not always apprised of the other entities and agencies that are consulted during the review process; it is unclear whether those other entities and agencies are required to adhere to timelines;
- local governments handle remainders (portions of land left over after a tract

has been designated as a proposed subdivision) differently;

- "minor subdivision" is not defined in the Subdivision and Platting Act;
- there is some confusion over whether certain review periods consist of calendar days or working days; and
- counties are required to have a growth policy in place before they can conduct summary review of proposed subdivisions; some counties have had difficulty implementing growth policies.

Witnesses also asked that the subcommittee be vigilant about maintaining the degree of local control that exists in the process under current law.

The subcommittee adopted the HJR 37 study plan as presented and determined that the study would entail:

- drafting a general technical cleanup of the Subdivision and Platting Act;
- devising a definition of "minor subdivision";
- determining whether to establish a statutory basis for the remainder doctrine;
- examining and possibly amending the time frames provided in the Act;
- examining the subdivision review process and the order in which various phases of review occur and determining whether improvements can be made;
- assessing whether more or less guidance should be given to local governments in the statutes; and
- ensuring that any changes contemplated will not conflict with the Sanitation in Subdivisions Act (Title 76, chapter 4).

Sen. Mangan asked that anyone who has suggestions for improving the subdivision review process to send comments by Dec. 10 to Leanne Kurtz, HJR 37 staff, who will compile the comments and forward them to the subcommittee before the next meeting.

For more information about HJR 37, please visit the Education and Local Government Committee's website at: [http://leg.mt.gov/css/committees/interim/2003\\_2004/edu\\_local\\_gov/default.aspx](http://leg.mt.gov/css/committees/interim/2003_2004/edu_local_gov/default.aspx) or contact Leanne Kurtz at [lekurtz@mt.gov](mailto:lekurtz@mt.gov) or by phone at (406) 444-3593.

Subcommittees To Meet in January...The Local Government, the K-12 Education, and the Postsecondary and Education Policy and Budget subcommittees will meet on Jan. 9, 2004, in Helena. The full committee is not scheduled to meet on that day. For more information about the Education and Local Government Committee or any of its subcommittees, please contact Connie Erickson at (406) 444-3078 or by e-mail at [cerickson@mt.gov](mailto:cerickson@mt.gov).

## CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee Works on Studies...The committee met in Helena on Oct. 30 and 31. The committee continued its work on the Senate Joint Resolution No. 11 study of drug and alcohol abuse treatment. The committee decided to concentrate its efforts on coordinated statewide leadership in the continuum of prevention, early intervention, treatment, and options available under the criminal justice system. At the next meeting, the committee will review models for addressing problems associated with drug and alcohol abuse and hear testimony from a variety of stakeholders. The committee is interested in understanding more about the Interagency Coordinating Council for Prevention and its potential for gaining more authority and visibility.

The committee also adopted a study plan for the House Joint Resolution No. 3 study on public defense for indigent parents in child abuse and neglect proceedings. The committee will look at the number of hearings and petitions in the system, review the status of treatment courts and parent education programs, and solicit the views of public defenders and prosecutors. The committee plans on coordinating its efforts with the Law and Justice Interim Committee's study on indigent defense.

Committee to Meet in January...The next meeting will be on Jan. 22 and 23, 2004. On Jan. 22, the committee will conduct its agency monitoring and administrative rules duties; review information on a variety of mental health issues, including a cost study of children with multiagency needs and the DPHHS plan for service area authorities under SB 347; and work on the SJR 11 study of drug and alcohol abuse. The meeting on Jan. 23 will be devoted to the HJR 3 study of defense for indigent parents in child abuse and neglect proceedings.

For more information or to be included on the committee's interested persons list, contact Susan Byorth Fox at (406) 444-3597 or [sfox@mt.gov](mailto:sfox@mt.gov).

## ENVIRONMENTAL QUALITY COUNCIL

The Boston Marathon is for Wimps... The Environmental Quality Council will meet in Helena on Jan. 13, 14, and 15, 2004. The EQC subcommittees will meet on Tuesday, Jan. 13. The EQC will meet on Wednesday and Thursday, Jan. 14 and 15 in Room 102 of the state Capitol in Helena. The unusual 3 day meeting is the result of the EQC's efforts to review and evaluate a wide variety of significant water policy issues this interim, guided in part by the legislative requests associated with the HJR 4 study resolution. The EQC plans to address topics such as the supply and distribution of water in Montana; federal reserved water rights; the water right adjudication process and enforcement; coal bed methane, metal mine bonding, and a multi-agency project that will review the relationship between certain environmental conditions and human health.

If you have questions or need additional information regarding TMDLs or the HJR4 study, please contact Krista Lee Evans at (406) 444-3957 or kevans@mt.gov.

EQC Agency Oversight Subcommittee... The Agency Oversight Subcommittee will meet Jan. 13 in Room 102 of the state Capitol. Proposed agenda items include presentations and discussion on the development of an updated statewide elk management plan and a sage grouse management plan; multi-agency efforts to address forest fire prevention in residential interface areas; Missoula County's federally designated non-attainment status for air quality; state agency guidance or standards development for the cleanup of methamphetamine labs; an update on litigation related to the Montana Environmental Policy Act; and a review of some of the EQC's statutory duties.

For further information on subcommittee activities, contact Larry Mitchell, staff, at (406) 444-1352 or lamitchell@mt.gov.

EQC Energy Policy Subcommittee... The EQC Energy Policy Subcommittee is scheduled to meet January 13, 2003 in Room 137 of the State Capitol building. Continuing with its work plan, the subcommittee will hear panel discussions on hydrogen fuels, ethanol, and distributed wind energy.

For further information on subcommittee activities, contact Todd Everts, staff, (406) 444-3747 or teverts@mt.gov.

Contact the EQC... Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at <http://www.leg.mt.gov/css/lepo>, by calling (406) 444-3742, or by emailing mtheisen@mt.gov.

## ECONOMIC AFFAIRS COMMITTEE

Joint Meeting with State Administration and Veterans' Affairs Committee on Jan. 23... The two interim committees charged with monitoring state agencies dealing with financial services regulation will have a joint meeting the morning of Friday, Jan. 23 to review financial regulation at the state and federal levels. The Economic Affairs Committee, which monitors insurance and securities issues handled by the State Auditor's Office, will meet in Room 102 at 8 a.m. with the State Administration and Veterans' Affairs Committee, which monitors the Banking and Financial Institutions Division in the Department of Administration.

Just Who Regulates Whom?... The impetus for the educational session came from a call for action by the Financial Services Committee of the National Conference of State Legislatures. NCSL asked legislators to comment on a proposed rule by the federal Office of the Comptroller of the Currency. The rule would preempt state laws that apply to federally chartered banks. Pointing to state laws regarding consumer protection and credit card accounts, the OCC says the proposed rule conforms to a practice that has been in effect based on court rulings. (For more information about the proposed rule, see the Federal Register, Vol. 68, No. 150, Aug. 5, 2003.)<sup>1</sup>

NCSL sent notices in late September, requesting comment on the proposed OCC rule as a state's rights issue and suggesting that the proposed rule would threaten the continuation of the dual banking system under which banks can choose to be federally chartered or state chartered. NCSL also wrote that the proposed rule goes beyond current law by preempting any restraint by state law imposed on federal banks "in whole or in part, or condition."

Given two distinct views on the issue of financial regulation and questions about whether or how the proposed OCC rule or other proposed federal legislation or rules may affect securities and insurance regulation, the committees agreed to a joint session to hear who regulates whom and how that may be changing. The request for the session came from Sen. Royal Johnson, who had contacted both the OCC and the NCSL about the proposed rule. He suggested an educational session might be beneficial.

The agenda will include presentations by the state banking commissioner and the commissioner for securities and insurance regarding what they regulate. Invited participants will include representatives of the Federal Reserve Bank, the Federal Deposit Insurance Corp., the National Credit Union Administration, the OCC, and the Securities and Exchange Commission. All will be asked to discuss the differences in

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<sup>1</sup>The proposed rule can found by going to <http://www.gpoaccess.gov/fr/index.html>. Click on the "Go" button to browse the table of contents, click on Tuesday, August 5, 2003, then scroll down to Comptroller of the Currency.

state and federal regulation of financial institutions, how regulation is changing, and prospects for the future.

Open invitation...Legislators and the public are invited to attend. Legislator expenses will be paid only for members of the two committees that are meeting. The State Administration and Veterans' Affairs Committee will meet in Room 137 after lunch, while the Economic Affairs Committee will continue to meet in Room 102. More information about each committee's afternoon agenda will be available in the next issue of **THE INTERIM**.

For more information, please see the website of the respective committees at: <http://leg.mt.gov> (just follow the "Committees" links), or call Pat Murdo or Dave Bohyer, committee staff, at (406) 444-3064.

## REVENUE AND TRANSPORTATION COMMITTEE

Committee to Meet in December...The Revenue and Transportation Committee is meeting Dec. 11 and 12 in Room 137 of the state Capitol. On Friday, Dec. 12, Alan Hodge of *Global Insights, Inc.* (a national economic forecasting firm) and Paul Polzin, Bureau of Business and Economic Research, University of Montana, will discuss national and state economic trends that may have a bearing on the state's revenue.

The agenda for the Dec. 11 meeting will include, among other items, the following:

- report on fiscal year 2004 general fund collections;
- SJR 29 study background report on the valuation of centrally assessed electrical generation property;
- report on the property tax exemption for intangible personal property;
- report on the cost of DOR compliance staff and additional revenue generated;
- update on activities of the tax reform and property reappraisal committees;
- report on the reauthorization of federal highway funds for Montana;
- litigation reports from the Departments of Revenue and Transportation;
- the U.S. Highway 2 reconstruction study; and
- highway safety

The Loop is Always Open...For more information about the Revenue and

Transportation Committee, its work plan, or agendas, please visit the website (<http://www.leg.mt.gov> and follow the "Committees" links), or contact Jeff Martin at (406) 444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov) or Leanne Kurtz at (406) 444-3064 or [lekurtz@mt.gov](mailto:lekurtz@mt.gov).

## ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee Meets, Takes Action...The Energy and Telecommunications Interim Committee met Nov. 20 in Helena. Highlights of the meeting are described below.

NorthWestern Bankruptcy...Public Service Commission Chairman Bob Rowe briefed the committee on funding for participation by the state in the NorthWestern Corporation bankruptcy case. Rowe noted that Gov. Martz provided almost exactly the amount of money that the PSC requested to participate in the bankruptcy proceedings.

Al Brogan, PSC attorney, described the PSC's efforts and noted that the case is proceeding at a rapid clip. An agreement was reached that requires that revenue from universal system benefits (USB) charges be placed in a separate account and that interest accrued on these funds be used for USB programs. The USB charges are collected from electricity and natural gas customers and used to pay for low-income bill assistance and weatherization and for renewable energy and energy conservation projects.

In response to motions by the PSC and the Montana Consumer Counsel, the bankruptcy court exempted the PSC proceedings from the automatic stay. When a bankruptcy petition is filed, an automatic stay prohibits certain activities. (NorthWestern may seek a stay of PSC actions under other provisions of the law.) The PSC has filed a limited objection regarding the sale of Expanets, Inc., a NorthWestern Corporation subsidiary. The PSC is concerned that certain provisions of the sale agreement may impose liability on the parent corporation.

Committee members asked several questions about the bankruptcy case. In particular, committee members discussed potential effects on contracts with energy suppliers as well as efforts by other entities to acquire NorthWestern Energy's utility assets.<sup>1</sup>

Transmission of Energy...Representatives of two potential competing regional transmission organizations (RTO's) presented information about their efforts.

Western Interconnect, LLC, has filed a request for certification as an RTO with

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<sup>1</sup>On Nov. 17, 2003, MDU Resources Group, Inc., Basin Electric Power Cooperative, and a group of Montana and South Dakota cooperatives announced their interest in acquiring NorthWestern Energy's utility assets.

the Federal Energy Regulatory Commission. Camden Collins, president and CEO of Western Interconnect, described the process the company intends to follow. They plan to defer to ongoing regional planning efforts initiated by the Western Governors' Association and others.

Ted Williams, president of RTO West, described the history and current status of development of RTO West. The goal of RTO West is to facilitate efficiency in the wholesale electricity market. There are numerous issues to be resolved. A group of major stakeholders developed a consensus proposal regarding governance of the RTO. Williams noted that the toughest question -- who pays for expanded transmission? -- remains unanswered.

Sen. Fred Thomas participated in a National Conference of State Legislatures meeting regarding transmission of electricity. He noted that some policy makers are starting to view transmission systems in a way that is similar to the approach to the interstate highway system.

Jay Waterman, NorthWestern Energy, talked about the transmission of natural gas. Montana obtains most of its gas supply from Alberta, which has substantially more known gas reserves. Nonetheless, he noted that gas exploration and production in Montana is still important. The demand for gas in NorthWestern's service territory is increasing and the company will need to enhance pipeline capacity.

Governor's Consumer Energy Protection Task Force... Gov. Martz sent a letter to committee Chairman Rep. Alan Olson, requesting that the Energy and Telecommunications Interim Committee work with her staff on the following Consumer Energy Protection Task Force recommendations:

- PSC authority to review transfers of utility property used to provide regulated utility services. The interim committee has already begun exploring this issue which is included in its work plan (see below).
- Inclusion of generation assets in the rate base of the default supplier of electricity.
- Advanced approval for use of default supplier-owned generation assets to meet the obligation to provide default electricity supply.

The task force is also discussing ring-fencing. The term "ring-fencing" refers to measures that insulate utilities from the impact of riskier activities undertaken by holding companies or nonregulated affiliates. The interim committee added this topic to its work plan.

PSC Authority Over Utility Transactions... PSC Chairman Bob Rowe described the authority that the PSC is seeking. The PSC seeks express statutory authority to approve the sale, transfer, merger, or disposition of utility property. The PSC provided

committee members with examples of laws from other states that grant this authority. Rowe emphasized that the PSC would not review transactions involving nonregulated utilities or involving property that is not necessary to the utility's regulated operations. Furthermore, the PSC would propose an exception for transactions occurring in the ordinary course of business or transactions involving property valued below a specified threshold.

John Alke, representing Montana-Dakota Utilities Co., stated that he and the PSC were close to working out mutually acceptable language for a bill granting this authority. He also thought that concerns raised by the telecommunications industry during the 2003 legislative session could be addressed.

Action Taken on Universal System Benefits Charge... The committee voted to request that a bill be drafted to extend the USB charge assessed on electricity consumers until 2009. (Under current law, the charge expires at the end of 2005.) The committee is seeking ideas and comments on options to revise the USB programs for natural gas and electricity. A draft work book is available. For information on how to comment or get a copy of the work book, see "Want to Know More?" below.

Next Meeting in Great Falls... The time and location of the next meeting were changed. The committee will meet Jan. 29 and 30 in Great Falls.

Want to Know More?... A meeting schedule, agendas, a universal system benefits work book, links, and other information may be viewed on the committee's website. To get to the website, type "<http://leg.mt.gov>," click on "Committees," then click on "Interim." Contact Mary Vandenberg at (406) 444-5367 or [mvandenberg@mt.gov](mailto:mvandenberg@mt.gov) for more information or to be added to a mailing list. Both snail mail and email options are available.

## LEGISLATIVE COUNCIL

Council to Meet Early Next Year... The Legislative Council will meet Friday, Jan. 16, 2004, in Helena. The proposed agenda includes status reports on state revenue collections and expenditures; activities of the SJR 32 Subcommittee on Medical Liability Insurance; recent court challenges to state statutes; the 2003 video minutes pilot project; and *Legislators Back to School Week*. The council will also discuss the next steps related to action items identified during its September planning session; select dates for the 2004 party caucuses, new legislator orientation, and continuing education program; and review proposed changes to the Legislative Council rules of procedure addressing bill drafting.

For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail message to [lomenzies@mt.gov](mailto:lomenzies@mt.gov).

## SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE

Subcommittee Hits the Road, Meets in Billings... The subcommittee, created by the Legislative Council and commissioned to study medical liability insurance issues met in Billings on Sunday and Monday, Nov. 16 and 17. On Sunday evening, the meeting was held at the Deaconess Billings Clinic in the Mary Alice Fortin Health Conference and reconvened on Nov. 17 at the Mansfield Health Education Center at St. Vincent's Hospital.

The subcommittee received a legal history on medical liability law in Montana and a briefing on the purpose, duty, and authority of the Montana Medical Legal Panel. The subcommittee was also briefed on how other states have reacted to medical liability insurance premiums and availability issues and heard reports on the results of surveys undertaken by, respectively, the Montana Hospital Association and the Montana Medical Association.

Medical Liability Premiums Increase, Availability Declines... A focal point of the Sunday and Monday sessions was testimony from doctors and hospital representatives from across the state. About 40 individuals testified from 14 remote sites through the hospitals' video teleconferencing capabilities and on site at BDC and St. Vincent's, respectively. One theme of the testimony was that premiums for medical liability insurance have increased rapidly, even exorbitantly, in the past few years and that the availability of medical liability insurance has declined simultaneously. Another theme among those testifying is that revenue received by doctors and hospitals is stagnant or even declining, due in large part to significant decreases in reimbursement rates for services provided to Medicare and Medicaid recipients, of which Montana has a relatively high and increasing proportion. Many doctors and hospitals view the combination of the rate increases and the declining availability of medical liability insurance as a looming if not current crisis with respect to the providers' abilities to continue delivering high quality health care in Montana.

What wasn't so clear from the testimony was the underlying reasons for the premium increases for and declining availability of medical liability insurance. Many doctors and hospital administrators testified that Montana desperately needs what is generally referred to as "tort reform". Other doctors and administrators and their representatives testified that increasing premiums and decreasing availability may be due, instead, to a combination of the insurance business cycle, the bursting of the stock market bubble in 2000, the events of September 11, 2001, actual incidents of medical error, the state's tort climate in general, a possible need for certain insurance reforms, and other factors.

To further complicate matters, staff research has found that the 54th Montana Legislature (1995) substantially enacted the principal reforms now sought in other

states and at the federal level -- caps on noneconomic damages, 3-year statute of limitations, screening panel for alleged incidents of malpractice, periodic payment of awards, collateral source rule, joint and several liability, etc. -- and yet medical practitioners and facilities in Montana are suffering the same rapidly escalating premiums as are seen elsewhere (where "tort reforms" have not been enacted).

Subcommittee to Look at Medical Liability Underwriting in January... As a consequence of its findings to date, the subcommittee will turn its attention to gaining a more complete understanding of medical liability underwriting practices, including the actuarial underpinnings of underwriting for medical liability. To that end, the subcommittee is scheduled to meet on Thursday, Jan. 15, 2004, in Room 137 of the Capitol. It is anticipated that a seminar on medical liability underwriting conducted by insurance/actuarial experts will be the centerpiece of the meeting.

Information Available on Website... More details of the subcommittee's meetings, past and future, are and will be posted to the subcommittee's website as they become available. For more information, please check the subcommittee's website or contact Dave Bohyer of the Legislative Services Division by phone at 444-3064 or by e-mail at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## STATE ADMINISTRATION AND VETERANS' AFFAIRS COMMITTEE

Committee to Meet Jointly with Economic Affairs Committee... The State Administration and Veterans' Affairs Interim Committee is scheduled to meet on Friday, Jan. 23, 2004, at the State Capitol in Helena. Although the details of the agenda are yet to be worked out, the committee has tacitly agreed to a joint meeting with the Economic Affairs Interim Committee for the morning of Jan. 23. The purpose of the joint meeting is to be briefed on and discuss the implications of administrative rules proposed by the federal Office of the Comptroller of the Currency aimed at sidestepping certain state laws that regulate banks and their affiliates. The National Conference of State Legislatures has identified the OCC's proposed rules as an issue that (1) infringes on states' rights, and (2) could substantially change the traditional dual banking system (state charter/federal charter) long recognized in the U.S. (See page 8 for additional coverage.)

Other Topics for the Committee... The remainder of the meeting will likely be devoted to issues identified by or associated with veterans' groups or the Montana Department of Military Affairs, updates on administrative issues emerging within the purviews of, respectively, the Department of Administration, the Office of the Secretary of State, the Office of the Commissioner of Political Practices, and the Board of

Veterans' Affairs. There are also a couple of items that the committee will be continue to monitor concerning the state's self-insurance program, the actuarial health of the state's major retirement systems, and implementation of the federal Help America Vote Act.

Additional details of the Jan. 23 meeting, as soon as they are available, will be posted to the committee's website. You can also contact Dave Bohyer by phone at 406-444-3064 or by e-mail at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## LEGISLATIVE FINANCE COMMITTEE

December Meeting... The Legislative Finance Committee will meet on Dec. 5, beginning at 8:30 a.m. The Legislative Fiscal Division staff and others will present:

- a report on 2005 biennium budget spending "pressure points";
- an update of wildfire costs;
- a general fund/federal funds update;
- an update on the Federal Jobs and Growth Relief Reconciliation Act funds;
- an issue related to a shortfall in the capital project fund;
- an update on certain interim work plan projects of the LFD staff;
- a report on information technology management, including IRIS (the POINTS replacement); and
- a fiscal update on the district courts assumption project.

In addition, other informational reports are planned.

The agenda and reports for many of these items are available on the LFD website at <http://www.leg.mt.gov/css/fiscal/lfc.asp> along with other committee information. For further information, contact Clayton Schenck at [cschenck@mt.gov](mailto:cschenck@mt.gov) or at (406) 444-2986.

## LAW AND JUSTICE COMMITTEE

Committee Reviews Public Defender Services... How public defender services are delivered and funded in Montana counties was the central topic of the Law and Justice Interim Committee's meeting in Helena on Oct. 23. The meeting was video taped by MTTV and broadcasted live in Helena and rebroadcasted on Nov. 8. Minutes of the meeting are available on the committee's website, which is accessible from [www.leg.mt.gov](http://www.leg.mt.gov).

The meeting laid the foundation for further study by providing committee members with basic background information and identifying which problems and

issues should be addressed. Committee staff presented a background report that discussed the following:

- judicial branch structure;
- the legal basis of the right to counsel;
- the standards that are used to measure the health of public defender services;
- how public defender services are provided nationally and in Montana; and
- funding issues and the effect of the state's recent assumption of 100% of the responsibility for District Court costs.

Following the background report, Ron Waterman for the ACLU, Brian Morris for the state, and Norm Grosfield for the counties discussed the ACLU lawsuit that alleges a fatally flawed public defender system in Montana.

Rep. John Parker, committee vice chair, moderated a roundtable discussion to identify problems with the current methods of providing public defender services. Roundtable participants included:

- Chief Justice Karla Gray, Supreme Court;
- District Court Judge Kenneth Neill, 8th Judicial District (Cascade Co.);
- Eric Olson, Chief Public Defender, Cascade County;
- Court Administrator Dorothy Bradley, 18th Judicial District (Gallatin Co.);
- Jennifer Bordy, Public Defender, Gallatin County;
- Chad Wright, State's Chief Appellate Defender;
- John Connor, State attorney, Department of Justice;
- Gordon Morris, MACo; and
- Fred VanValkenburg, County Attorney's Association.

The roundtable panel and the committee discussed House Bill No. 218, a bill introduced during the 2003 session that would have created a statewide public defender office attached to the Department of Administration, as a possible solution to problems identified. The bill passed the Senate overwhelmingly, but died in the House Appropriations Committee because of fiscal concerns. Although recognized as an option for the committee to consider as a possible recommendation for the next session, the committee agreed to continue a systematic study of public defender issues and the development of committee legislation based on the findings of the study.

January Meeting Scheduled... The committee's next meeting will be on Jan. 8, 2004. The committee will review how public defender services are provided in other states, consider an analysis of the pros and cons of establishing a statewide public defender system, and discuss various options for how Montana could structure and



fund such as system.

TIME AND TIDE

<u>Event</u>	<u>Days remaining</u>
Special session	?
Target date for completion of interim committee work (September 15, 2004)	290
General election (November 2, 2004)	338
59th Legislature convenes (January 3, 2005)	400

THE BACK PAGE

JUST YOUR LUCK,  
TRAVAILS WITHIN THE PUBLIC DEFENDER SYSTEM

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*Prologue: Discussing whether or not accused criminals are getting effective defense counsel on the taxpayer's dime does not exactly top the list of politically appealing policy topics. Yet, each individual's right to a defense attorney when facing incarceration or loss of fundamental rights, regardless of the individual's financial means, is as fundamental a right as free speech. Perhaps, in order to appreciate this right, one must come face to face with the prospect that yes, it could happen to you.*

JUST DRIVING ALONG

You are driving along the highway admiring the view when you notice the flashing lights of a highway patrol car in your rear view mirror. You pull over and watch the officer approach. Nothing to worry about, right? You will just get a ticket and, after you pay it, that will be that. But, after checking your driver's license and noting that something is amiss with respect to your vehicle's registration, the officer draws his revolver and asks you to step out of the car. Now you are worried. There must be some mistake. The officer asks you to put your hands behind your head and turn around. You are handcuffed, put into the patrol car, and taken to a police station.

UNDER ARREST

After what seems like an eternity, two officers enter the waiting room. One of the officers says he has a few questions for you but that he must first ensure you understand your Miranda rights: "You have the right to remain silent and refuse to answer questions. Anything you do say may be used against you in a court of law. You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future. If you cannot afford an attorney, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney. Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present?"

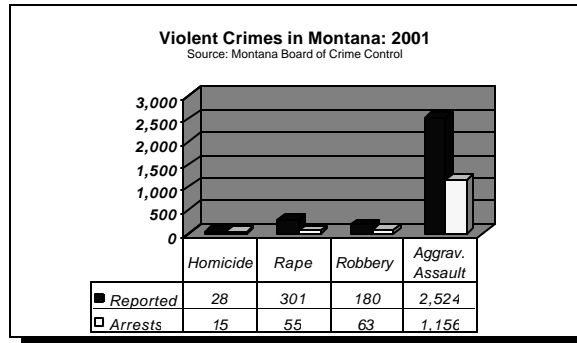
You nod your understanding and willingness to answer, after all, this is just a mistake and the sooner you clear it up the better. "Where did you live before moving to town? What brought you to town? How long have you lived here? Do you know this person?"

(You are handed a mug shot of the guy who sold you a car 2 months ago.) At first you answer these questions openly. But, then other questions come. "How long have you had your car? When did you last see this person? You two had a fight. Why? Do you own a handgun? Where were you on September 2." You are getting nervous. You are new to the area and lost your job three months ago when the mill closed. You are behind in your rent payments. When your car's engine blew, you bought a used car, real cheap, from a guy listing it "for sale by owner" and who closed the deal with you at a corner lot just outside of town. You exchanged some heated words with the guy, but in the end, you paid cash and drove away in the car. Yes, you own a handgun. No, you really do not recall exactly where you were September 2. Why should you?

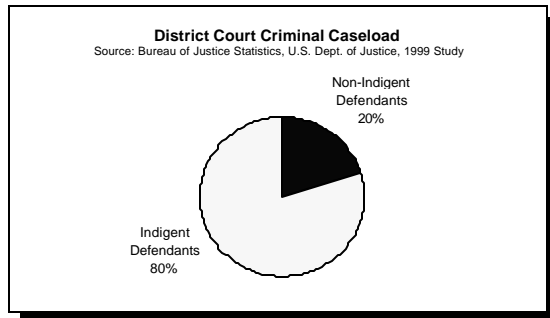
The rest of the meeting is a blur, except for the stark reality of someone saying, "You are under arrest for felony aggravated assault and motor vehicle theft." Later, you find out that the county attorney's office has decided to prosecute and that hearing dates will be set.

### JUST A STATISTIC NOW

You have not had your day in court yet, but you are already a statistic. You have been arrested for one of the 2,524 aggravated assault crimes reported; and because your case will be turned over for prosecution, you are also counted in the 45.4% "clearance rate" reported, which means that for criminal reporting purposes, the crime has been solved.<sup>1</sup> The motor vehicle theft, being the lesser crime,

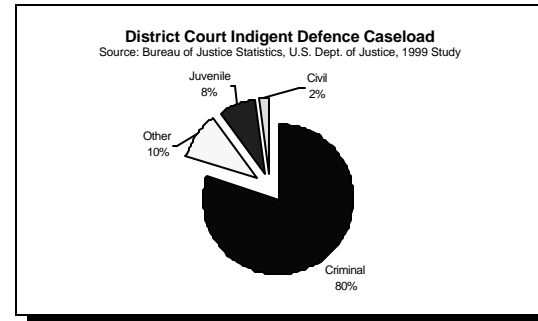


will not be reported for statistical tracking.



You need an attorney. You do not own a home, and have two part-time jobs, one at a mini-mart, the other at a pizza place. You are looking for better work, but you know you cannot afford a private criminal defense attorney and the tens of thousand of dollars that

could be owed when all was said and done. So, you ask for a public defender and sign an affidavit swearing that you do not have the financial means to afford an attorney.



In declaring your indigent status, you have just become another statistic, part of the 80% of all felony criminal cases (see the chart on the previous page) in District Courts that involve indigent defendants, and, sliced the other way, part of the 80% of the District Court indigent defense cases that

involve a criminal offenses.<sup>2</sup> But, anyway you slice it, you are now a number in the vast majority of the criminal defense caseload.

### SERVICE DELIVERY

You have asked for a public defender, now what? A public defender's service can be provided in one of three ways: (1) through a contract between the county and a private attorney, (2) by the court appointing a private attorney, or (3) from a county public defender office with salaried public defenders on the county payroll. The county in which you have been arrested no longer contracts with private attorneys because recent legislation made the state solely responsible for paying all District Court costs, including indigent defense costs. Thus, the county no longer wants to be a party in a contract for services that are now the state's obligation to provide.<sup>3</sup> If, however, you had been arrested in Missoula, Cascade, Gallatin, Yellowstone, or Lewis & Clark County, you would have been represented by a salaried county employee because those counties have established county public defender offices. So, as in the majority of Montana counties, the District Court judge will appoint an attorney for you from a list of private attorneys willing to take on the work.

### WHAT ARE YOUR CHANCES?

Your arraignment date comes, an attorney is assigned, and you wait, in jail, for a chance to talk to your public defender--your "PD". When will your PD be in to meet with you? How many other cases will your PD have to worry about? Will your PD have the dedication, skill, and experience to defend you? Or will years of your life be spent in prison because your PD was the "meet 'em, greet 'em, and plead 'em" kind. Or, perhaps your PD will just be an overworked, underpaid, and inexperienced idealist. Yes, there

is also a chance that your PD will buck the stereotype (a stereotype that may be more myth than reality) and be a dedicated, hardworking attorney that will ensure your case gets handled properly irrespective of other pressures.

Although there are no statistics in Montana to help you estimate your chances with a public defender instead of a private attorney in Montana courts, a study of state courts across the nation shows that about 3 out of 4 defendants are found guilty regardless of whether they have a public defender or private attorney. That means your chances are not good, but at least they are the same as if you had the money to hire a private attorney. However, the national study also shows that you are less likely to be released on bail than a defendant with a private attorney and, if you are convicted, that you are more likely to get a longer sentence than a defendant with a private attorney.<sup>4</sup>

While you are waiting in jail, you hear stories about public defenders in Montana and they run the gamut from: "I didn't see my PD for months and when she finally did show up, there was no time to prepare for anything. What a fiasco," to "Thank God my PD knew what to do. Hope I get as good this time." There is also a lot of talk about the class action lawsuit filed in February 2002 by the ACLU against the state and 7 counties<sup>5</sup> alleging that chronic underfunding and a lack of dedicated resources for public defenders has, in effect, failed to protect defendants' fundamental constitutional rights to effective, publically funded defense counsel. Although briefs have been filed and positions staked out in the lawsuit, arguments will not be made in court until May 2004.

### ASSESSING THE ODDS

While there is little research and no court findings yet in Montana to help you calculate the odds, there are some indicators to think about. Some indicators include: (1) your PD's caseload; (2) how much PD's get paid and whether funding is available for additional expenses for such things as expert witnesses, private investigators, or paralegal support; and (3) your PD's experience, training, and professional work ethic.

### CASELOADS

As far as caseload, national standards suggest that an attorney should not carry more than 150 felony criminal cases like yours per year.<sup>6</sup> But this statistic gives you no help in assessing how many cases your PD is handling right now and whether those cases are complex or "easy" and how your case might be affected as a consequence. Moreover, you wonder whether the District Court judge would actually have any means of knowing what the attorney's caseload is, except to rely on the attorney to petition the court to appoint someone else because the attorney has too heavy a caseload already. But, you have heard stories of attorneys being reluctant to turn down cases assigned by a judge for fear of falling out of favor with that judge and being "hurt" professionally as a result. These perceptions could be fact or fiction because there are no Montana public defender caseload statistics available, and there is no centralized agency in

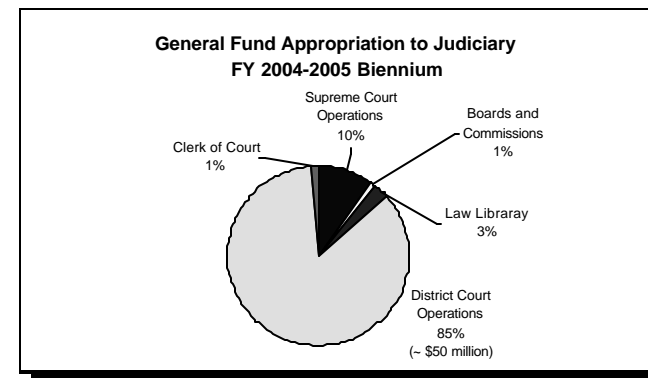
Montana where caseload data may be collected or analyzed to help gauge or manage PD caseloads.

### FUNDING

When it comes to salary and special expenses incurred for mounting your defense, the judge's court order will set your attorney's compensation rate and the judge will approve (or not) any petition by your PD for expenses such as an expert witness or a paralegal for research. The Montana Supreme Court has published guidelines for District Court judges about what expenses are allowable or not under state statute governs the funding of District Court indigent defense costs.<sup>7</sup> The Montana Supreme Court has also set policies specifying that a court-appointed PD's compensation may not be paid at rate of more than \$60 per hour and that the PD's general office expenses (i.e. "overhead") are not allowable costs. The policies also specify that actual expenses for witnesses, paralegal services, or investigators are paid only if they are authorized by the judge in a court order.<sup>8</sup>

Contemplating caseloads and funding issues, you are haunted by the story of a Montana public defender who accumulated an excessive caseload of 100 felonies and 250 misdemeanors involving indigent defendants, not counting his private practice workload.

By the end of the year, the public defender's compensation for working on an indigent defendant cases amounted to about \$18 an hour.<sup>9</sup> The attorney in this story was paid on a flat fee contract with the county, which is falling out of practice in Montana now, so you hope it will be



different with an appointed attorney who will be paid by the hour.

### ROBBING PETER TO PAY PAUL?

In setting your PD's compensation and approving other expenditures for your defense, the judge will be spending money appropriated to the Montana Supreme Court to cover all District Court costs, which includes salaries for judges, law clerks, court reporters, juvenile probation officers, operating expenses for other District Court programs. In FY 2001, public defender costs (through contracted services, appointed

counsel, or county public defender offices) amounted to about \$7.8 million. But, state funds set aside for indigent defense programs ran out about \$7.4 million, so counties picked up the tab for the difference, about \$400,000.<sup>10</sup> Since July 1, 2003, however, the state assumed sole responsibility for funding public defender costs and counties are no longer on the hook for any shortfall. Consequently, the other District Court programs could be impacted if indigent defense costs run higher than anticipated.

Combined with the Supreme Court's concern that legislative appropriations for the District Court program is inadequate even to pay the fixed costs, let alone the variable costs such as indigent defense, funding remains a central issue.

#### WHAT ARE THE STANDARDS AND WHO IS WATCHING?

What about your PD's qualifications, experience, or training? Presumably the Montana Appellate Defender Commission has provided District Court judges with a statewide list of attorneys qualified to act as public defenders. By statute, the Appellate Defender Commission must propose to the Montana Supreme Court minimum qualifications and performance standards for public defenders.<sup>11</sup> However, the Commission has yet to do so. What standards are applied when judges appoint public defenders (beyond the requirement that the attorney must be a member of the Montana Bar Association) are, therefore, not formally specified.

#### LET JUSTICE BE DONE

As you sum up your thoughts on the odds of getting a good PD, you conclude that in the absence of statistical data and with no statewide standards or managerial oversight of PD services provided by court-appointed attorneys, much depends on the decisions made by the judge and the ethics of the appointed attorney. You want to believe that there are judges dedicated to ensuring the defense is well provided for and attorneys willing and capable defending you against these charges and the evidence presented. You hope that when the people say "let justice be done," they are not just thinking about the prosecution. But, you figure that how good or bad your PD will be is pretty much the luck of the draw.

Time passes. You wait in jail. Finally, your PD walks through the door. Your trial is about to start. It is time to find out what kind of hand you drew.

*Epilog: The Law and Justice Interim Committee has made examination of Montana's public defender system its number one priority. The LJIC next meets on January 8, 2004, in Helena and will examine public defender systems in other states and begin to analyze pros and cons of a statewide public defender system.*

#### ENDNOTES

1. This is 2001 data taken from the following publication: Montana Board of Crime Control, *Crime in Montana: 2001 Annual Report*, MBCC, September 2002, pp. 60-63.
2. Bureau of Justice Statistics, *Indigent Defense Statistics: Summary Findings*, U.S. Department of Justice, web page publication at <http://www.ojp.usdoj.gov/bjs/id.htm>, as it appeared on November 12, 2003, and was last revised on October 1, 2001.
3. Senate Bill No. 176 (Ch. 585, L. 2001), together with other legislation enacted in 2003, provided that the state assumed 100% of the funding responsibility for District Court programs. Before this "state assumption", the state helped counties pay for the indigent defense costs and usually could fund 100% of those costs, but the counties were on the hook for paying any shortfall that occurred. Under state assumption, counties no longer have that "safety net" obligation.
4. Bureau of Justice Statistics, Special Report, *Defense Counsel in Criminal Cases*, U.S. Department of Justice, Office of Justice Programs, November 2000, NCJ 179023.
5. Six of the counties have since been dropped from the lawsuit because they no longer contract for public defender services. However, Missoula County, which has a county public defender office with salaried employees, remains a defendant in the case.
6. Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, Indigent Defense Series No. 4, U.S. Department of Justice, January 2001, NCJ 185632, prepared by The Spangenberg Group.
7. See Section 3-5-901, MCA. The categories of indigent defense expenses that are eligible for state funding did not change when the state assumed responsibility for paying those expenses.
8. Montana Supreme Court, *Handbook on the Payment of State Costs for Montana's District Courts*, Office of the Court Administrator, July 2003.
9. Bureau of Justice Assistance, *Contracting for Indigent Defense Services: A Special Report*, Indigent Defense Series No. 3, U.S. Department of Justice, April 2000, NCJ 181160, p. 15.
10. Information provided by the Office of the Court Administrator.

11. Section 2-15-1020, MCA.



## INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,  
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

### DECEMBER

December 5, State-Tribal Relations Committee, Room 137, 9:30 a.m.

December 5, Legislative Finance Committee, Room 102, 8:30 a.m.

December 11, Revenue and Transportation Committee, Room 137, 9 a.m.

December 12, Revenue and Transportation Committee, Room 137, 8:30 p.m.

December 17, Legislative Audit Committee, Room 102, 8:30 a.m.

December 18, Legislative Audit Committee, Room 102, 8 a.m.

December 25, Christmas Day, holiday

### JANUARY 2004

January 1, New Year's Day, holiday

January 8, Law and Justice Committee

January 9, Local Government Subcommittee

January 9, K-12 Education Subcommittee

January 9, Postsecondary and Education Policy and Budget Subcommittee

January 13, EQC Agency Oversight Subcommittee, Room 102

January 13, EQC Energy Policy Subcommittee, Room 137

January 14, Environmental Quality Council, Room 102

January 15, Environmental Quality Council, Room 102

**JANUARY 2004 (Continued)**

January 15, SJR 32 Subcommittee on Medical Liability Insurance, Room 137

January 16, Legislative Council, Room 102

January 22, Children, Families, Health, and Human Services

January 23, Children, Families, Health, and Human Services

January 23, Joint meeting of the Economic Affairs Committee and the State Administration and Veterans' Affairs Committee, Room 102, 8 a.m.

January 23, Economic Affairs Committee, Room 102, 1 p.m.

January 23, State Administration and Veterans' Affairs Committee, Room 137, 1 p.m.

January 29, Energy and Telecommunications Committee, Great Falls

January 30, Energy and Telecommunications Committee, Great Falls